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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

NO. 281.

The City of Pawhuska, Plaintiff in Error

vs.

Pawhuska Oil and Gas Company, and the State of Oklahoma,

Defendants in Error

In Error to the Supreme Court of the State of Oklahoma.

REPLY.

Preston A. Shinn,
For Plaintiff in Error.

Pawhuska Capital Print, Pawhuska Okla.

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REPLY.

The answer brief of the Pawhuska Oil & Gas Company, on pages 3 and 8, would take the position that the City of Pawhuska, Plaintiff in Error, was relying upon Section 593 of the Revised Laws of 1910, which

was Section 398 of Volume 1 of Wilson's Statutes of 1908, carried over by the Schedule to the Constitution.

Plaintiff in Error believes that its brief is plain as to this point, and that is, that the City is relying on the provisions of the State Constitution. The Schedule to the Constitution only placed in effect such laws of the Territory "which are not repugnant to this Constitution" (Schedule, Sec 2, 223 of Williams' Constitution). At the time the City and the Gas Company entered into the contract herein the City received its authority from the State Constitution and not from the acts of the Legislature, and the Supreme Court of this state, relative to this same franchise, held that the authority of the City grew out of the Constitution; that the sections of the Constitution pertaining thereto were self-executing.

Mayor of Pawhuska v. Pawhuska Oil & Gas Co., 28 Okla., 563.

Should this Court hold that the authority of the City to enter into the franchise herein was not conferred by the terms of the Constitution, but from Section 593 of the Revised Laws of 1910, then the City says that said section specifically gave the right to "contract" and by ordinance to fix rates, and that same is protected from Legislative acts by Section 18 of Article 9 of the Constitution, which section contains the following:

"The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic for transportation and transmission companies, shall, subject to regulation by law, **be paramount**; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be **subject** to the **superior** authority of the Legislature to legislate thereon by general laws; Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town, or county to prescribe rules, regulations, **or rates of charges** to be observed by any public service corporation in connection withh any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise".

The above excerpt from Section 18 is a limitation upon the authority of the Legislature. Therefore, if Section 398 of Wilson's Statutes was carried over, and became Section 593 of the Revised Laws of 1910, and was not repealed until the Act of 1913, conferring authority upon the Corporation Commission, a contract made in 1909 between the parties herein, would be protected by Section 18 of Article 9 of the State Constitution, and therefore, the authority having been given by the state to the city, same would be protected by the Contract Clause of the Federal Constitution.

ARTICLE IX, SECTION XVIII.

Counsel in Answer Brief say that Section 18 of Article 9 is subject to repeal by the Legislature, and therefore does not apply. We refer to Section 18 of Article 9, in our principal brief, but only for the purpose of throwing light upon the construction to be given Article 18 of the Constitution. To the end that the Court may see that other sections of the Constitution sustain our contention as to the meaning to be given Article 18, touching municipal corporations, and the authority conferred upon them by that Article. The printer in setting up the brief of the Gas Company left out the word "from" in Section 35 of Article 9, which word becomes very important in reaching a correct conclusion as to the authority of the Legislature to repeal Section 18. Section 35:

> "After the second Monday in January, nineteen hundred and nine, the Legislature may, by law, from time to time, alter, amend, revise, or repeal sections **from** eighteen to thirty-four, inclusive, of this article, or any of them, or any amendments thereof: **Provided, That no amendment made under authority of this section shall contravene the the provisions of any other part of this Constitution other than the said sections last above referred to or any such amendments thereof."**
>
> (Williams' Constitution, page 120, 121.)

Not knowing what view the Court will take of the materiality of Section 18, supra, we will discuss the right of the Legislature to repeal same. The Act of

1913 did not pretend in any manner to change or repeal Section 18, and in other instances in which the Legislature had the right to change the Constitution, and exercised the right, the Act of the Legislature has shown on its face that the intention of the Legislature was to amend the Constitution, as authorized by the Constitution. If it had been the intention of the Legislature to repeal this section of the organic law, cerainly attention would have been called to the fact, to the end that the people might know that the organic law had been changed.

The court will notice that the section reads, "sections **from** eighteen to thirty-four, inclusive." This section, as well as Section 18, was taken from the Virginia Constitution of 1902 (Note to Williams' Constitution, pages 103, 121,). Section 35 of Article 9 was changed in its reading from the Virginia section by inserting the word **"from"** before the word "eighteen". It has been well established by the courts of this country and of England that "from" is used as a word of exclusion, unless in reading the context of the instrument the court should find that it was the intention to use same as a word of inclusion. The case of Pugh v. Leeds, 2 Cowp. (Eng.) 714, opinion by Lord Mansfield, seems to be the leading case, and the principle therein stated has been re-stated and followed by the courts of this country, including the State of Oklahoma.

See Budds v. Frey, 104 Minn. 481, American & English Anno. Cases, Vol. 15, page 24, and an exhaustive note thereto, citing cases from most of the states, as well as the Federal Courts.

In Rex v. Gamlingay, 3 T. R. (Eng.) 513, the Court said:

"The case of Pugh v. Leeds, 2 Cowp. 714, was properly decided; but that turned on the construction of a contract between two persons, where their intention was to be considered. But greater certainity is required in indictments than in contracts of that kind. Now the whole of the road described by the former part of the indictment is excluded by the terms 'from' and 'unto' ".

"The word 'from', in its literal and restricted sense, generally means exclusive, but it may be used in a connection that means inclusive. In construing it, therefore, courts will take into consideration the context and subject matter, and construe it to mean either inclusive or exclusive, according at it is influenced by its connection."

Baker v. Hammett, 23 Okla. 480, 100 Pac. Rep. 1114.

Lewis' Sutherland Statutory Construction (Second Ed.) Vol. 1, page 330, says: " 'From' is a term of exclusion, * * * *."

The general rule is that Constitutions can only be amended by the people, and not by the Legislature. This is the rule in all the states, including Oklahoma. It is only a few provisions of the Constitution that the Legislature is authorized to repeal. If, as was said in Rex v. Gamlingay, supra, indictments must be strictly construed, how much stronger does the same rule apply to those who contend that a provision of the Constitution can be repealed? The authority of the Legislature must be plainty set forth in the Constitution before it would have that right.

We invite the Court to a study of the context of Article 9, of the Constitution, as well as to a study of the history of the times. Section 15 of this Article creates the Corporation Commission, Section 16 prescribes the qualifications of its members, and Section 17 prescribes the form of oath to be taken by the Commissioners. Section 18 confers jurisdiction on the Commission, and says therein, that: "The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be **paramount**; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the **superior** anthority of the Legislature to legislate thereon by general laws". Of course the Corporation Commission cannot be "paramount" as to transportation and transmission companies, and yet subject to having its authority

wiped out by the Legislature. If Section 18 is subject to repeal by the Legislature, then we have a Corporation Commission, well qualified, and under oath to perform the duties of the office, but with out any jurisdiction whatsoever. In view of the fact that Commissions of this kind have been provided for in a large majority of the states, as well as the Interstate Commerce Commission of the Federal Government, can this Court say that the people of Oklahoma intended such a foolish thing as to allow some future legislature to fritter away the rights of the people by depriving the Commission of its jurisdiction? That the people were only interested in creating positions to be filled by high salaried officials, without jurisdicton to serve the public?

Sections 18 and 35, supra, were taken from the Virginia Constitution, but our Convention added the word "from" in Section 35, and we think clearly intending that Section 18 was not to be repealed by the Legislature. The word "inclusive" after the words "thirty-four" was for the purpose of making sure that Section Thirty-four could be repealed by the Legislature. Having used the word "inclusive" in the section, the Convention would have said "both inclusive" and omitted the word 'from', had it intended that Section 18 was to be repealed at the will of the Legislature. Or Sections 18 to 34, inclusive.

OKLAHOMA CASES.

Defendant in error cite Pionerr Tel. Co., v. State, 33 Okla., 724 and S. McAlester v. Eufaula Tel. Co., 25 Okla., 524, as being authority to sustain the position of the Legislature, and its authority to confer jurisdiction on the Corporation Commission by the Act of 1913. In the Pioneer case, supra, the franchise was granted in Oklahoma City in 1906, prior to Statehood, by a City of the First Class, but under laws applicable to "cities, towns, and villages", and under a section that only attempted to give the right to the municipality to "authorize the construction and maintenance of telephone wires along or through the streets and alleys" and to "grant franchises and rights to corporations for such purposes and to regulate the same". There was no authority given to **contract** or to **regulate rates and charges.** The Corporation Commission received its jurisdiction from Section 18 of Article 9, to control transmission companies, and the Pioneer Company came within the definition of transmission Companies as given in Section 34 of Article 9, In that case the Court said:

> "Assuming, but not deciding, that subdivision 20 of Section 512, supra, is applicable to cities of the first class, we connot agree with appellant that thereby the power to fix telephone rates was granted by the Legislature to the city".

In the McAlester case, supra, the Court was called upon to construe a franchise entered into prior to Statehood, and in the Indian Territory, under laws that did not pretend to give the municipality the right to **contract** or to **regulate the charges for public services.** Franchises that were not made under authority given by the Constitution, as in the instant case.

HOME TELEPHONE CASE.

We come within the rule announced by this Court in Home Telephone Co. v. Los Angeles, 211 U. S. 265, where this Court said:

> "No other body than the supreme Legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient."

In the instant case the supreme authority is the people, and they have spoken through the State Constitution, wherein authority has been conferred to legislate franchises, with a limitation that "the power to regulate the charges for public services" shall never "be surrendered". And why shall the power to regulate charges never be surrendered? Because, at some future time a new Constitution may be adopted by the people, and then it may be determined that the right

granted to municipalities touching franchises was a mistake, and they do not want outstanding contracts touching rates and charges that are binding and cannot be changed. So the people said, "the power to regulate the charges for public services" shall never "be surrendered."

Respectfully submitted,

Preston A. Shinn,
For Plaintiff in Error.

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In Error to The Supreme Court of The State of Oklahoma.

BRIEF AND ARGUMENT OF PAWHUSKA OIL AND GAS CO., DEFENDANT IN ERROR.

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In Error to The Supreme Court of The State of Oklahoma.

BRIEF AND ARGUMENT OF PAWHUSKA OIL AND GAS CO., DEFENDANT IN ERROR.

STATEMENT OF CASE.

The question raised in this case is whether or not the Corporation Commission of the State of Oklahoma, in providing for an increase of rates for the sale of gas by the Pawhuska Oil & Gas Co. to the inhabi-

tants of the City of Pawhuska, and requiring that all gas sold by the Pawhuska Oil & Gas Co. be sold through meters, at meter rates, violated the provisions of Section 10, Art. 1 of the Constitution of the United States, in that by said order the Corporation Commission impaired the obligations of a contract entered into between the City of Pawhuska and the Pawhuska Oil & Gas Co., in 1909.

The Pawhuska Oil & Gas Co. was granted a franchise by the City of Pawhuska, through initiative petition on the 12th day of October, 1909. Under the laws of the State of Oklahoma, franchises may be granted in two ways; one by the mayor and council, or Board of Commissioners, with referendum to the people, or by an initiative petition on the part of the people themselves, without action on the part of the mayor and council, or Board of Commissioners. It is immaterial, so far as the rights and duties of a company obtaining a franchise, which way it is granted. The franchise in this case was granted to the Pawhuska Oil & Gas Co. about two years subsequent to the adoption of the state constitution. A full and complete copy of said franchise will be found on pages 9, 10 and 11 of the record. Whatever rights the city of Pawhuska had to grant the franchise must be found in the constitution and the laws of the State of Oklahoma. Art. 18 of the Constitution of the State of Oklahoma has to do with municipal corporations, and in connection therewith deals with the matter of franchises granted by such corporations. At the time the franchise in question was granted, the City of Pawhuska did not have a charter form of government, but was governed by a

mayor and council. At that time cities were authorized by the law of the state to grant franchises to municipal companies, giving them the right to use the streets and alleys for the purpose of the utility. The special statute giving cities this right, is Sec. 593 Rev. Laws of Okla. 1910. Subsequent to the enactment of that statute, the legislature, by Chap. 93, Session Laws of Okla., 1913, p. 150, conferred jurisdiction upon the Corporation Commission of the State of Oklahoma to fix rates for public utilities. It is claimed in this case, that said Chap. 93, Session Laws of Okla., 1913, violated the Constitution of the State of Oklahoma, with reference to municipal corporations, and that since the Corporation Commission of the State of Oklahoma in this case acted under the authority of said statute, that their order is void, for the reason that it impaired the obligations of a contract existing between the Pawhuska Oil & Gas Co. and the City of Pawhuska, growing out of said franchise. The contention of the Pawhuska Oil & Gas Co. is that Chap. 93, Session Laws of 1913, is entirely consistent with the constitution of the State of Oklahoma, and superseded Sec. 593, Rev. Laws of Okla., 1910, in so far as it conferred the right to fix rates for public utilities upon the Corporation Commission, and took that right away from municipalities. It must be borne in mind that the franchise in this case was granted subsequent to statehood and, was subject to the provisions of the constitution of the state. It must also be borne in mind that while Sec. 593, supra, is substantially the same as Sec. 398, Vol. 1 of Wilson's Statutes of 1903, the same was continued in force

on the incoming of statehood, under the terms and conditions of the constitution of the state.

The Supreme Court of the State of Oklahoma has on several different occasions construed the constitution of the state with reference to the power of municipalities to grant franchises, and with reference to the right of the state by legislative enactment to change or modify franchises granted by cities, with reference to rates, and in each instance, as well as in the present case, the Court gave an entirely different construction to the meaning of the constitutional provisions and the statutes to that which is asked for by the plaintiff in error—the state Supreme Court always holding that the constitution of the state, in place of granting to municipalities the exclusive right to make franchises and fix rates, specifically denies that exclusive right to cities, and retains the power to do so in the state whenever the state may see fit to exercise the power. It is contended by the Pawhuska Oil & Gas Co., that under the record in this case, the precise question involved has been repeatedly decided contrary to the contentions of the appellant, by the Supreme Court of the State of Oklahoma, and by this Court. The transcript of record in this case, and the brief of the appellant, sufficiently set forth the various orders and statutes, so that we do not deem it necessary at this time to repeat them.

BRIEF AND AUTHORITIES.

The State, through the Corporation Commission, has the right to change rates fixed by franchise, especially where the franchise was granted subsequent to statehood, and in doing so does not violate Sec. 10 of Art. 1 of the Federal Constitution.

Section 7, Article 18, Constitution of Oklahoma.

Chapter 93, Session Laws of 1913, page 150.

Pawhuska Oil & Gas Co. v. *City of Pawhuska*, —Okla.—, 148 Pac. 118.

Pioneer Telephone Company v. *State*, 33 Okla.724, 124 Pac. 173.

South McAlester v. *Eufaula Telephone Co.*, 25 Okla. 524, 106 Pac. 962.

City of Pawhuska v. *Pawhuska Oil & Gas Co.*, 166 Pac. 1058.

City of Kenashaw v. *Kenashaw Telephone Co.*, 135 N. W. 849.

Benwood v. *Public Service Commission*, 83 S. E. 295.

Milwaukee Electric Railway and Light Company v. *Railroad Commission of Wisconsin*, 238 U. S. 174.

City of Englewood v. *Denver & South Platte Ry. Co.*, Adv. Op. U. S. Sup. Ct., p. 149, Feb. 1, 1919.

Raymond Lumber Co. v. *Raymond Light and Water Company*, 159 Pac. 133.

City of Manitowoc v. *Manitowoc and Northern Traction Company*, 129 N. W. 925.

Borough of Belvue v. *Ohio Valley Water Company*, 91 Atl. 236.

J. I. Case Plow Works Company v. *Oklahoma Gas and Electric Company*, P. U. R. 1915 B, 183.

City of Henryetta v. *Smith and Swan Gas Company*, order Corporation Commission, 1324.

Temp v. *Mountain States Telephone and Telegraph Company*, P. U. R. 1915 D, 716.

Yeatman v. *Towers*, P. U. R. 1915 E, Atl. 158.

Landon v. *Lawrence*, P. U. R. 1915 E, 763.

In re Augusta Water District P. U. R. 1916 E, 31.

In re Murray & Fletcher, 2nd Calif. R. C. R. 464.

In re Lake Helmet Water Company, P. U. R. 1917 A, 448.

In re United Fuel & Gas Company, P. U. R. 1917 A, 923.

Water, Light & Gas Co. v. *Hutchinson*, 52 L. Ed. 257.

Home Tel. & Tel. Co. v. *Los Angeles*, 53 L. Ed. 176.

The State has a right, in the interest of conservation, and to prevent waste and discrimination, to require that all gas be sold through meters at meter rates, and in doing so does not violate Sec. 10 of Art. 1, of the Federal Constitution.

Pawhuska Oil & Gas Company v. *City of Pawhuska.*, —Okla.—, 148 Pac. 118.

Commonwealth v. *Trent*, 77 S. W. 390.

Townsend v. *State*, 37 L. R. A., 294.

Jamison v. *Indiana Natural Gas and Oil Company*, 12 L. R. A. 652.

Hawthorne v. *National Carbonic Gas Company*, 23 L. R. A. (N. S.) 436.

C. B. & Q. R. R. Co. v. *State of Nebraska*, 17 Supreme Court Reporter, U. S. 513.
Thornton Oil and Gas Co., Sec. 398.
Arizona Corporation Commission v. *Morenci Water Company*, P. U. R. 1916 E. 387.
Wood v. *Village of LaFarge*, P. U. R. 1917 A. 763.
Auto Supply Company v. *Central Illinois Public Service Company*, P. U. R. 1915 B. 205.

"The decision of the highest court of a state, denying the existence of the contract alleged, being in harmony with the constitution and laws of the state, as expounded by the decisions of the highest courts of the state, will be followed by this court."

S. McAlester v. *Eufaula Tel. Co.*, 25 Okla., 524, 106 Pac. 962.
Pioneer Telegraph & Telephone Co. v. *State*, 33 Okla., 724, 127 Pac., 1073.
Pawhuska Oil & Gas Co. v. *City of Pawhuska*, 148 Pac., 118.
City of Pawhuska v. *Pawhuska Oil & Gas Co.* 166 Pac. 1058.
Milwaukee Electric Railway & Electric Light Co. v. *Railroad Commission of Wisconsin*, 238 U. S. 174, 59 L. Ed. 1254.
City of Englewood v. *Denver & S. Platte Ry. Co.*, U. S. Supreme Court Advance Opinions, Feb. 1st, 1919, p. 149.

ARGUMENT.

The State, through the Corporation Commission, has a right to change rates fixed by franchise, especially where the franchise was granted subsequent to statehood, and in doing so does not violate Sec. 10, Art. 1, Federal Constitution.

It is earnestly contended for by counsel for the a
pellant that the franchise between the Pawhuska G
and Gas Company and the City of Pawhuska, is
contract of such a nature that the State cannot alt
the same by legislative enactment or by order of t
Corporation Commission under powers delegat
to it by the State and that to do so would be in viol
tion of the constitutional rights of the city again
impairing the obligations of contracts. It is insist
that Section 593 of the Laws of 1910, which was t
statute in force at the time the franchise was gran
ed, with a slight modification made by the Co
Commission, and which is not material so far as th
case is concerned, is a specific grant of power to t
council of the city to provide by ordinance for t
lighting of the streets of the city and the fixing
prices to be paid for gas and light and it is such
grant of power as cannot be withdrawn by the sta
from the city so as to affect any contracts or fra
chise in existence at the time the authority is wit
drawn. That this grant of power is protected
Section 18, Art. 9, of the Constitution of Oklahom
apparently counsel have overlooked Section 35
Art. 9 of the Constitution which says:

> "After the second Monday in Januar
> Nineteen Hundred and Nine, the Legislatu
> may, by law, from time to time, alter, amen
> revise or repeal Sections Eighteen to Thirt
> four, inclusive, of this article, or any of the
> or any amendments thereof."

Chapter 93, Session Laws, 1913, page 15
is an amendment or a repeal of Section Eightee
Article 9 of the Constitution in so far as said sectio
may relate to the proposition herein involved.

The Corporation Commission, in passing upon the contention, on the part of the city, says:

> "The Commission has heretofore considered the question of its authority to change rates fixed by franchise and has not hesitated to prescribe a different schedule of rates than that provided by franchise where the facts justified. This was the position taken in the case of *J. I. Case Plows Works, et al* v. *Oklahoma Gas and Electric Company*, Cause 1987, Order No. 911, P. U. R., 1915 B, 183, wherein the Commission, in ordering a reduction of electric power rates, said:
>
> 'It is contended by the defendant that it is only complying with the ordinance which was adopted by the voters of Oklahoma City. The Corporation Commission, however, may alter rates established by franchise, * * * * * * *, Chapter 93, Session Laws of 1913, page 150, confers jurisdiction upon the Commission to fix rates, prescribe regulations, service and practices of water, heat, light and power companies and gives the commission general supervision over such utilities.
>
> 'Whether the minimum rate provided in the franchise was reasonable depended upon the conditions that existed at the time the franchise was adopted by the people. The Commission must now determine the reasonableness of this minimum rate under the conditions and facts disclosed by the evidence in this case.'
>
> In Cause No. 2584, Order 1314, *City of Henryetta* v. *Smith & Swan Gas Company*, the Commission said:
>
> 'The Commission is of the opinion that when the franchise under consideration was grant-

ed, the municipality of Henryetta was without authority to exercise the legislative function of rate making to the extent of suspending the right of the sovereign authority to exercise same upon proper occasion.'

The Commission herein cited a number of cases upholding this position of the Commission, among them the case of *Benwood* v. *Public Service Commission*, 83 S. E. 295, 55 L. R. A. (N. S.) 261, wherein the Supreme Court of West Virginia sustained an order of the *Public Service Commission of Milwaukee Electric Railway & Light Company* v. *Railroad Commission of Wisconsin*, 238 U. S. 174, wherein the Supreme Court of the United States affirmed a decision of the Supreme Court of the State of Wisconsin sustaining a decision of the Wisconsin Railroad Commission changing rates fixed by franchise.

The case of the *Pioneer Telephone & Telegraph Co.* v. *State et al.*, 33 Okla., 724; 127 Pac. 1073, should be controlling as to the right of the Corporation Commission to change rates fixed by franchise. Therein the Court held that the order of the Commission and not the franchise provision governed telephone rates. The position of the city that there is a material distinction between the issue involved in that case and the present case is, we think, not well taken. Therefore, the Commission holds that it has authority to prescribe a schedule of rates for the City of Pawhuska, regardless of any franchise or contract existing between the City of Pawhuska and the Gas Company."

This position of the Corporation Commission is amply justified and fully supported by the decisions

of the Supreme Court of Oklahoma and the decisions of the Supreme Courts of other states and the Public Service Commissions of other states. The question was directly before the Supreme Court of Oklahoma in the case of the *Pawhuska Oil and Gas Company* v. *City of Pawhuska*, 148 Pac. 118. In that case the question directly involved was the rights of the state to enact the law approved February 28, 1913, requiring that gas be sold through meters at meter rates. It was there urged by the City of Pawhuska, as it is now urged, that the law was in contravention of contractual relations between the city and the company, the obligations of which, the State could not impair. The Court, in that case, said:

> "In support of the action of the court, in perpetually enjoining the company, as stated, it is urged that the franchise, fixing, as it does, both a flat rate and a meter rate, constitutes a contract between the city and the company, the obligation of which, the state cannot impair, as is attempted by the act aforesaid. This was, in effect, the holding of the trial court and that said act is void. The court erred; This for the reason that said act was one of police regulation intended to prevent the waste of gas. The very act authorizing the city to grant this franchise is entitled 'An act to regulate the use and preservation of oil and gas, * * * *,' and stripped to the point, gives this and like companies authority to build pipe lines through the streets and alleys of the municipalities of this state with the consent and 'subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted.' Which shows the intent of the state to be, in authoriz-

ing the municipality to grant this franchise, to reserve to the municipality, notwithstanding the terms of the franchise, the power to police the business of distributing gas thereunder in that municipality. This police power had theretofore been reserved both to the state and to the city. Article 18, Chapter 7, of the Constitution provides:

'No grant, extension or renewal of any franchise or other use of the streets, alleys or other public grounds or ways of any municipality, shall divest the state, or any of its subordinate subdivisions of their control and regulation of such use and enjoyment.'

Having been expressly reserved by said section of the Constitution to both the state and the municipality, and again expressly reserved to the city by the act authorizing the municipality to grant the franchise, the reservation of the power was as much a part of the franchise as if written therein. It follows that whether the franchise amounted to a contract between the city and the company we need not say, for, sure it is, the state, by the act complained of, had a right to say to the company, as it did in effect by the terms of said act, that in the interest of the conservation of the natural resources of the state, the company shall no longer be permitted to sell gas at a flat rate, but thereafter was required to furnish the same to its customers (with certain exceptions named in the act) through standard meters and at meter rates. And this was a proper exercise of police power."

The same proposition was before the same court in the case of *Pioneer Telephone and Telegraph Com-*

pany v. *State*, 127 Pac., page 1073. Paragraphs 1 and 2 of the syllabus read as follows:

> "Power on the part of an incorporated city or town to fix municipal telephone rates can only be derived from the supreme Legislature by express grant or by necessary implication from powers expressly granted.
>
> Where a municipality with no power to fix municipal telephone rates, by ordinance pursuant to subdivision 20 of section 512 of Wilson's Rev. & Ann. St. 1903, granted to a telephone company the right to occupy and use its streets and public ways, subject to certain police regulations, and by section 9 said ordinance fixed municipal telephone rates, held, that said section to that extent is void, although accepted and acted upon between the parties in interest and is not protected by article 9, chapter 18, of the Constitution, so as to prevent the Corporation Commission from establishing another or different rate pursuant to the same article and section."

This question was before the Supreme Court of Washington in the case of *Raymond Lumber Company* v. *Raymond Light and Water Company*, 159 Pac. 133. That court, on page 135 referring to this specific question, uses the following language:

> "The question then arises, if the contract was valid at time it was entered into, can it be determined under the provisions of the Public Service Commission Law subsequently passed? As already stated the water company was a public service corporation, and jurisdiction over its rates and service was conferred by the Public Service Commission Law upon the Public Service Commission. The

power to regulate and control the rates of public service corporations is within the legitimate exercise of the police powers of the state. This power may be exercised by the Legislature itself by enacting a law fixing rates, or the legislature may delegate the power to fix rates to a properly constituted commission, subject to judicial review. *State ex rel. Webster* v. *Superior Court*, 67 Wash, 37, 120 Pac. 861, L. R. A. 1915 C, 287 Ann. Cas. 1913 D, 78. In this state the Legislature has conferred the rate making power upon the Public Service Commission by the Public Service Commission Law.

It is contended that even though the state under its police power may fix the rates to be charged by public service corporations, that notwithstanding this fact a contract, valid when entered into, is but subject to be abrogated under the provisions of a law subsequently enacted. The contention cannot be sustained. The rule is that contracts upon subjects which are within the police power, even though valid when made, must be taken to have been entered into in view of the continuing power of the state to control the rates to be charged by public service corporations."

The Supreme Court of Wisconsin, in the celebrated case of the *City of Manitowoc* v. *Manitowoc and Northern Traction Company*, 129 N. W., page 925, in considering the powers of the railroad commission of that state to fix rates, after an exhaustive examination of all the authorities, in the opinion of the case, says:

"No specific authority having been conferred on the city to enter into the contract in

question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent and to this extent only is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting *section* 1852 *of section* 1863, St. 1898, the state intended to surrender its governmental power of fixing rates, that power was only suspended until such time as the state saw fit to act. *City of Ashland* v. *Wheeler*, 88 Wis. 607, 60 N. W. 818; *Home Telephone & Telegraph Co.* v. *Los Angeles*, supra; *Freeport Water Co.* v. *Freeport*, supra; *Stanislaus Co.* v. *San Joaquin. etc. Co.*, *supra*. Furthermore, the right conferred on a railroad company to use the public streets, under *section* 1862 of *section* 1863, becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it. *State ex rel* v. *Mattison*, *St. R. R. Co.*, 73 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; Wright Mer. & L. Co., 95 Wis. 29, 36, 69, N. W. 791, 36 L. R. A. 47, 60, Am. St. Rep. 74; *State ex rel* v. *Anderson*, 90 Wis. 550, 565, 63 N. W. 746; *State* v. *Superior Court*, 105 Wis. 651, 673, 81 N. W.1046, 48 L. R. A. 819; *State* v. *Portage Water Co.*, 107 Wis. 441, 445, 83 N. W. 697; *Allen* v. *Clausen*, *supra*. This being so, the reserve power of amendment or appeal, contained in section 1, art. 11, Const., would seem to empower the Legislature to modify the condition on which such franchise was given, as well as to repeal or amend the franchise itself. *Chapin* v. *Crusen*, 31 Wis. 209; *West Wis. R.*

R. Co. v. *Supervisors*, 35 Wis. 267; *Attorney General* v. *Railway Cos.* 35 Wis. 425."

It is not deemed necessary to quote from all the decisions of the various states on this question. That the state may, by legislative enactment change the terms of a franchise such as that under question, or may empower the Corporation Commission to do so is settled by the decisions of this court and of the decisions of the state supreme courts. That the various public service commissions in the country are holding to this same doctrine, we think is likewise true. In the case of *Re Lake Helmet Water Company* P. U. R. 1917 A, page 458, the California railroad commission had before it the same question and in paragraph 3 of the syllabus declared the law to be:

> "The fixing of rates by the California Commission different from those prescribed in service contracts does not deprive rate payers of property without due process of law, or impair the obligations of the contracts, in violation of provisions of the state and Federal Constitution, since the contracts are subject to the reserve power of the state to alter or amend in the exercise of the power to regulate public utilities."

In the opinion in the case page 467 it uses the following strong language.

> "The consumers further urge that the establishment of rates herein by the Railroad Commission would impair the obligations of their contracts with petitioner, in violation of paragraph 10 of art 1, of the Federal Constitution.

> That every public utility which enters into a contract for service to a consumer does so subject to the reserve power of the state to alter or amend such contract in the exercise of its power to supervise and regulate public utility is clearly established by the authorities. We refer to the following decisions of the Railroad Commission and to the authorities therein cited:
>
> *Re Murray*, 2 Calif. R. C. R. p. 464; *Ukiah* v. *Snow Mountain Water and P. Co.*, 4 Calif. R. C. R. p. 293; *Sausalito* v. *Marin Water and Power Co.*, 8 Calif. R. C. R. p. 252.
>
> We are satisfied, after a careful review of the objections urged by the consumers herein, that the Railroad Commission has jurisdiction in this proceeding, and that it is our duty to establish just and reasonable rates to be charged by the petitioner."

In the case of *Reunited Fuel Gas Company*, P. U. R. 1917 A, page 923, the Public Service Commission of West Virginia had before it the question of its power to increase rates of a public service company, and in paragraph 3 of the syllabus declared the law to be as follows:

> "The West Virginia Commission has power to increase the rates of a public service company notwithstanding a franchise provision that the rates shall in no case exceed the schedule specified therein."

And in the opinion of the case, page 928 and 929, says:

> "The protestant, the town of Ceredo, questions the authority or jurisdiction of the Commission to change the rates in Ceredo because of the following provision in the franchise un-

der which the applicant company is operating:

> " 'And be it further ordained that said party or his assigns, as a condition of the exercise of the privileges and grants contained herein, or any of them, shall furnish for public and private use to said town and its inhabitants such natural gas for the purpose aforesaid, at a reasonable price and in no case to exceed the schedule of rates charged by the said O. Germer, Jr., or his assigns, in the City of Huntington, under a franchise owned by them in said city, * * * "
>
> The Commission has passed upon this question in two cases, to-wit: The City of Benwood against the Public Service Commission and Re Glenville Natural Gas Company. In both of which cases it proceeded without regard to the express terms of the franchise; the language used in said cases being almost identical with the language here used. The former case was reviewed by the supreme court and the Commission sustained. *Benwood* v. *Public Service Commission*, 75 W. Va. 127, L. R. A. 1915 C. 261, 83 S. E. 295; *Re Glenville Natural Gas Co.* P. U. R. 1915 F, 848."

The Public Utilities Commission of Maine, in the case of *Re Augustus Water Disrict* P. U. R. 1916 E, 31, treating of the same question, declares the law in the fourth paragraph of the syllabus to be as follows:

> "Assuming that a municipal franchise contract providing for free water for municipal and fire protection purposes was valid when made, its performance becomes unlawful by virtue of a subsequent statute providing that all individuals, firms and corporations,

whether private, public or municipal, shall pay the rates established by a board, and that the rates shall be uniform, since it was competent for the legislature to waive any contract rights of the muncipality without infringing the constitutional provision against impairing the obligation of a contract."

And on page 43 uses the following language in the opinion:

> "In *Sausalito* v. *Marin Water & Power Co.* P. U. R. 1916A, 244, the same Commission says: 'Now, however, it is unanimously held that the provisions of the Federal Constitution forbidding laws impairing the obligation of contracts, and declaring that property shall not be taken without due process of law, have no application to the regulation and supervision of public utilities by the state, under its police power. No public utility can, by the simple device of entering into contracts with its consumers, withdraw itself from the state's control. All such contracts, whether made before or after the state actually undertakes the supervision and control of public utilities, must be taken to have been made subject to the state's right to exercise its power of supervision and control whenever it sees fit to do so. Citing *Odd Fellows Cemetery Asso.* v. *San Francisco*, 140 Cal. 226, 73 Pac. 987; *Chicago B. & Q. R.* v. *Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Manigault* v. *Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127, and many other cases with extracts from them."

Perhaps the most exhaustive opinion to be found upon the question of rate making by a public serv-

ice commission is that of the Kansas Public Utilities Commission in the case of *Landon* v. *Lawrence*, P. U. R. 1915E, 763. In paragraph 10 of the syllabus that commission declares the law to be as follows:

> "Franchise ordinances requiring gas companies to furnish service free to cities in consideration for use of the streets do not interfere with the power of a public service commission to fix the proper rates therefor, since such ordinances are not contracts protected against impairment by the provisions of paragraph 10 of the Federal Constitution."

And on pages 794 and 795 in the opinion, the Commission used the following strong language:

> "The furnishing of 'free gas' to cities in consideration for the use of streets in compliance with terms of ordinances is a species of patent discrimination against those consumers who are required to pay scheduled prices, and it should therefore be promptly discontinued.
>
> "Rates for natural gas should be fixed so as to provide for a reasonable margin of return for unexpected outlays liable to occur in conducting so hazardous an enterprise, and, since the public is vitally interested in the continuation of the service, no unreasonable restriction should hamper the company in reaching a new source of supply and serving the public as long and as well as practicable."

The Arizona Corporation Commission had also had this same question before it in the case of *Tempe* v. *Mountain States Telephone and Tele-*

graph Company, P. U. R. 1915 D, p. 716. That Commission also reached the conclusion that prior franchise contracts providing for certain rates did not affect the power of the state through the Commission to provide for other and different rates and in the syllabus announces the law as follows:

> "The power of the Arizona Commission to regulate the rates of the telephone company is not affected by prior franchise contracts providing that certain rates should be charged and that certain free service should be supplied the municipality, where the only power to make such a contract is to be found in a general statutory provision giving the municipality exclusive control over its streets, alleys, avenues and sidewalks."

As has been specifically held in the foregoing cases, the right of the state to amend or alter franchises is always reserved unless specifically otherwise provided. Hence, the rights of the state, either by legislative enactment, directly or indirectly, by power conferred upon the Corporation Commission to change rates at any time it sees fit, when public service demands it cannot be questioned. To hold different at this time would be to overrule the former opinions of the supreme Court of Oklahoma in the cases of the *Pawhuska Oil and Gas Company* v. *City of Pawhuska; Pioneer Telephone Company* v. *State*, and the *South McAlester Eufaula Telephone Company* v. *State, supra.*

The State has a right, in the interest of conservation and to prevent waste and discrimination to require that all gas be sold through meters at

meter rates, and does not violate Sec. 10, Art. 1, of the Federal Constitution.

It is the announced doctrine in the state of Oklahoma, both by legislative enactment and the decisions of the highest court, that the state has the right to enact laws, the purpose and object of which is conservation and to prevent the waste of its natural resources. This was specifically declared in the case of *Pawhuska Oil and Gas Company* v. *City of Pawhuska*, 148 Pac. 118, in which the court definitely held that it was within the police powers of the State to enact legislation that would prevent waste of natural gas by requiring that all gas be sold through meters at meter rates. It is a well settled doctrine that the sale of gas or water or electricity at a flat rate brings about waste and extravagance in the use of those commodities and also causes such discrmination between consumers as to be unlawful and wrong.

The question of control over public utilities with reference to their service in supplying these commodities to the public was definitely placed in the hands of the Corporation Commission by Section 2 of Chapter 93, Session Laws, 1913, page 150, which reads as follows:

> "The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations affecting their services, operations, and the management and conduct of their business; shall enquire into the management of the business thereof, and the method in which same is

conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the constitution and laws of this State, and with the orders of the Commission."

On the question of the right of the Commission to require the installation of meters, the Commission says in its opinion in this case, pages 18, 19 and 20, of the Transcript of Record.

"The Commission can also order the installation of meters if the facts justify it. Chapter 93, Session Laws 1913, provides in part as follows:

'Sec. 2. The Commission shall have general supervision over all public utilities with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operations and the management and conduct of their business; shall enquire into the management of the business thereof, and the method in which the same is conducted.

'Sec. 3. In addition to the powers enumerated, specified, mentioned or indicated in this act, the Commission shall have all additional, implied and incidental powers which may be proper and necessary to carry out, perform and execute all powers herein

enumerated, specified, mentioned or indicated.' * * *

"Counsel for the city in their brief cite Chapter 200, Session Laws 1915, to uphold their contention that this Commission has no authority to require the installation of meters or to prescribe meter rates. This law, we think, was in no way intended to limit the Commission in the exercise of its authority to regulate gas companies.

"In the case of the *Pawhuska Oil and Gas Company* v. *City of Pawhuska*, 148 Pac. 118, the Supreme Court upheld the right of the gas company to install meters under Chapter 152, Session Laws 1913. Chap. 200, Session Laws 1915, in no wise prevents the commission from requiring the installation of meters when the facts show that such a requirement would be justified. As heretofore pointed out, the regulations of the Secretary of the Interior, to which the gas company's lease is subject, provides that gas shall be sold through meters. Failure to comply with this requirement may mean cancellation of the lease and that the gas company would be deprived of the source of its supply.

"It is a matter of common observation that the consumption of gas, water or electricity, on a flat rate, not subject to a meter measurement or affected by the quantity consumed, is productive of waste. A consumer of natural gas who is paying for the amount he uses on a flat rate instead of a meter basis, will ordinarily consume much more than he would if he were paying for it on a meter basis. Stoves and lights will be allowed to burn when there is no necessity for burning them, and will consume greater

quantity than there is any necessity of consuming. The history of natural gas consumption shows that where consumers have been allowed to pay for the amount they use on a flat rate, that it has been no uncommon thing to allow lights to burn day and night, whether they needed it or not. Investigation by the Commission shows that more than one gas company in this state has been compelled to do business at a loss due solely to the fact that consumers were allowed to pay for gas on a flat rate and thereby use more than was necessary and more than was paid for at reasonable meter rates.

Exhibits filed in this case and not excepted to by counsel for the city show that certain consumers used one-third more gas on the flat rate than they do on the meter basis. (Gas Company exhibts I, J, K and L.) The unnecessary use of gas, i. e. the consumption of amounts in excess of that required for the comfort of the necessity of the consumer is waste. Furthermore, flat rates are discriminatory. Exhibits in this case show that consumers purchasing gas on a flat rate are paying at least 25 per cent. less than those who purchased gas through meters. This is an unlawful discrimination. All consumers of each class should be treated alike and no difference should be made in rates because a part of the consumers are allowed to buy gas on a flat rate, whereas others are on a meter basis. A portion of the consumers who pay for gas on a flat rate will be provident in the use of gas. Some will use an unnecessary amount and will therefore throw the burden of their extravagance on the other consumers.

"The Commissions of the various states have generally held that meter service should be required in order to prevent waste and to provide against discrimination.

"The Wisconsin Railroad Commission in the case of *Charlesworth* v. *Omro Electric Light Company*, P. U. R. 1915B, page 13, said:

" 'The Commission has found repeatedly that flat rates lead to waste of service and inequality of charges.'

"In the case of *Wood* v. *La Farge*, P. U. R. 1917A, 783, the same Commission said:

" 'The present flat rate schedule, in addition to being inequitable as between consumers, is doubtless responsible for a considerable amount of waste in that flat rate users invariably grow careless and allow faucets to remain open when water is not actually required or fail to have leaky fixtures repaired.

In the case of *Redding* v. *Northern California, P. Ro.*, P. U. R. 1916 F, 839, the California Railroad Commission said:

'It is believed that if meters are installed, and, in consequence, water waste is reduced, better pressure will result.'

An additional argument for installation of meters is a probable reduction in operating expenses. * * * * The power bill for pumping now amounts to 60 per cent to the total operating expenses of the plant. The water use for 1915 totals 591 gallons per capita per day. This is found to be an excessive use in comparison with towns of similar population and location where metering

has been resorted to. If a reduction in the use of water is brought about there should be a corresponding reduction in the power bill and operating expenses. With rates based on the cost of service, it is evident that the interest of the consumer lies in the installation of meters. A provision governing the installation of meters should be embodied in rules and regulations to be filed with the Commission.

The Commission finds that the installation of meters in the present case would tend to prevent waste, eliminate discrimination, increase the revenue and operating expenses of the gas company, and lessen the burden of the consumers by reducing expenditures which it would be necessary for them to make for gas and oil to allow the company to make a return on its investment and to take care of depreciation.

This position of the Commission is sustained not only by the highest court of this state but by the highest courts of other states in cases where the same question has been before them. In the case of *Commonwealth* v. *Trent, et al.* 77 S. W. 390, the Supreme Court of Kentucky in treating a statutory amendment for the prevention of waste of gas said in the 6th paragraph of the syllabus the following:

"Acts 1891-93, page 60, 61 (Ky. St., Sec. 3910, 3914) enacted for the prevention of the waste of gas and enjoining the plugging of wells not in use, was within the legislative power to enact as a protection of the natural resources of the state, to the rights of the public to which the rights of individual

owners are subject. And in the opinion in that case gave to us the following language:

> 'The position that the defendants may do what they please with the gas after it is reduced to possession cannot be maintained. For, as the gas goes out of the gasometer, its place is taken by other gas coming in from the well. Property is the creation of law. The use of property may be regulated by law. The legislature may protect from waste the natural resources of the state, which are common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of gas would be to deprive the state and its citizens of the many advantages incident to its use. That the legislature may prevent this is well settled. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44, L. Ed. 729; *State* v. *Ohio Oil Co.* (Ind.) 49 N. E. 809, 47 L. R. A. 627; Donahue on petroleum and gas, Sec. 23.'

In the case of *Townsend* v. *State*, 37 L. R. A. in which the appellant has been prosecuted for burning natural gas for illuminating purposes in what is known as flambeau lights, the court held the statute valid and not in interference with property rights and not violative of any constitutional guarantee. Touching upon the right of the state to exercise its police power when the public interest demands the same, the court says:

> "In *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385, Mr. Justice Brown of the Supreme Court of the United States, delivering the

opinion of that court, said: 'The extent and limit of what is known, as a police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the discussion or abatement by summary proceedings of whatever may be regarded as a public nuisance. * * * * Beyond this, however, the state may interfere whenever the public interests demand it; and in this particular, a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.

"If this be a correct enunciation of the law on the subject in hand—and we think it is—it disposes of much of the argument of the learned counsel as to the question of facts involved in the act in question, as to whether in fact burning natural gas by flambeau lights is a waste of natural gas. When the legislature enquired into that fact, their determination was conclusive on the courts. *Gentile* v. *State*, 29 Indiana 415, 417; *Jameson* v. *Indiana Natural Gas and Oil Company*, 128 Ind, 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613; *Mode* v. *Beasley*, 143 Ind. 306 and cases cited on page 315, 143 Ind.; *Woods* v. *McCay*, 144 Ind. 136, 33 L. R. A. 97, and cases cited on pages 322, 323, 144 Ind.; *Jackson County Comrs.* v. *State*, Brown (Ind.) 46 N. E. 908."

In the case of *Hawthorn* v. *National Carbonic Gas Company*, 23 L. R. A. (N. S.) 436, the Court of Appeals of New York had before it the proposition

of the legitimate exercise of the police powers of the state, and as will be seen in the report of this case, some of the most eminent lawyers of the state were interested and filed briefs, citing authorities, almost without number, upon the questions involved. Touching upon the police powers the court in that case said:

> "With the light thrown by the allegations of the complaint on the matter to which this provision relates, I should have no doubt that the latter was within the powers of the legislature, even if it were a new step in the realm of police or regulative legislation. But it is not of a new order, and, for the purpose of maintaining this proposition, I shall not discuss a great variety of legislative enactments held valid, which by analogy, seem to sustain this one, but shall come immediately to authority which directly sustained the present exercise of legislative power. In Cooley on Constitutional Limitations, 7th Ed. (page 829), it is said: 'The police power of a state, in comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.' This doctrine was quoted with approval in *People ex rel. New York Electric Line Company* v. *Squire*, 107 N. Y. 593, 605, 1 Am. St. Rep. 893, 14 N. E. 820. In *Com.*

> v. *Alger*, 7 Cush 85, it is said: 'Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

In the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, the Supreme Court of the United States held valid a statute of Indiana which had for its object preventing the waste of gas. The opinion is very exhaustive and clearly establishes the right of the State by legislative enactment to prevent the waste of this most beneficial commodity.

That the sale of gas at a flat rate is not only a waste that should be prohibited, but that it is such a discrimination between consumers as to be unjust and wrong, is the conclusion that has generally been reached by the various public utilities commissions throughout the United States.

The Arizona Corporation Commission in the case of *Arizona Corporation Commission* v. *Morenci Water Company*, P. U. R. 1916 E, 387, in considering the question of flat rate, with an alternative of meter rates, found that the same was unsatisfactory, and in paragraph 4 of the syllabus says:

> "A system of flat rates, with an alternative of meter rates for the same class of water service, is unsatisfactory both to consumer and utility."

The Railroad Commission of Wisconsin in the case of *Wood* v. *Village of LaFarge*, 1917 A. page 763, in the second paragraph of the syllabus, says:

> "Flat water rates are discriminatory, and should be abandoned as meters are installed."

And in the opinion in the case on page 765, deals with the question as follows:

> "According to testimony adduced at the hearing, it is the desire of the complainants and the village board to place the water plant upon a self-supporting basis and to eliminate the unjust discrimination as between consumers, resulting from the application of flat rates. This attitude is to be commended. The present flat rate schedule, in addition to being inequitable as between consumers, is doubtless responsible for a considerable amount of waste, in that flat rate users invariably grow careless and allow faucets to remain open when water is not actually required, or fail to have leaky fixtures repaired. If a general installation of meters were made, it is certain that the present rather high pumpage with its resulting high expenses would be materially reduced, and the capacity of certain portions of the plant conserved, thus postponing the time of necessary enlargement of facilities, and improving the fire-protection service. As the village officials appear to be desirous of metering the system, the new schedule of rates will be worked out on that basis."

In the case *Auto Supply Company* v. *Central Illinois Public Service Company*, the Illinois State Public Utilities Commission, P. U. R. 1915 B, page 205 in the syllabus in the case says:

"An electric company was permitted to discontinue flat rate service under special contract with individual consumers in order to prevent discrimination, and was ordered to place meters on the service of all its customers and to charge for such service at its regular rates, subject to the further order of the Commission."

Discussing the question on pages 208 and 209, the Commission reached the following conclusions:

"It is unfortunate that, in the rapid development of public utility enterprises, more particularly those of an electrical nature, the companies serving the public had in many instances during the past seen fit to render service to consumers on bases entirely without justification from either the standpoint of the value of the service to the consumer or the cost of service to the company. In many cases, it would appear that rates of this nature have been developed solely from the standpoint of securing the business for the utility company without any very definite thought or consideration being given to what effect the rates paid by any individual consumer would have upon the rates paid by other consumers or the general practical economic conditions involved. In many cases rates so developed have been entirely unjust and discriminatory. The fact that such rates have been made is not a serious criticism to the utility as might at first seem to be the case. Since the study of proper rates for utility service, particularly as among the different classes of consumers, has received careful consideration only during recent years, and in fact many of the points involved are still a matter of serious conten-

tion and dispute. Despite these facts, however, the continuation under the present conditions of rates which are obviously discriminatory, and which are not open to all consumers in the community receiving service, is unfair and is in distinct violation of the public utilities law of the state. The number of consumers in Olney who are receiving service at other than the legal rates of the company is a very considerable proportion of the entire consumers in the city, being in the neighborhood of 25 per cent. Without the placing of meters on these consumers, it is, of course, impossible to state whether the rates which they are receiving are preferential and discriminatory or not, but experience with flat rates has clearly shown that the tendency of the consumer is to use current freely and without regard to his actual need for it, so that it is not unreasonable to assume that these rates are preferential and discriminatory, and the testimony leaves no room for doubt that the company has refused to give these rates to other consumers having similar service conditions."

Reference to cases cited under the head of Brief and Authorities, supra, we think will fully sustain the position we have taken. We have not seen fit to quote from each case cited but only to select a sufficient number of cases to fully cover the ground and to show that the general holding of the courts and the public utility commissions throughout the United States are in harmony with the holding of the Corporation Commission of the State in this case.

"The decision of the highest court of a state, denying the existence of the contract

> *alleged, being in harmony with the constitution and laws of the state, as expounded by the decisions of the highest courts of the state, will be followed by this court.*"

In direct conflict with the decisions of the highest courts of the state, plaintiff in error attempts to construe the provisions of Art. 18 of the Constitution of the State of Oklahoma, so as to give to municipal corporations exclusive power to fix rates, and in support of its contention, cites *Enid City Ry. Co.* v. *City of Enid*, 43 Okla. 779; also *Sapulpa* v. *Sapulpa Gas Co.*, 22 Okla., 348, and *Oklahoma City* v. *Oklahoma Street Ry. Co.*, 20 Okla. 1, apparently overlooking the fact that each of these cases grew out of franchises granted prior to statehood, and that none of them present the same question that is here presented. *In Enid City Ry. Co.* v. *City of Enid*, on p. 783, the Court uses this language:

> "It must be kept in mind that this contract was entered into prior to the adoption of our constitution, and that the reserve power therein is not applicable or involved here."

This statement by the Supreme Court is tantamount to a holding in that case that the constitution had reserved the power in the state to alter or amend franchises, notwithstanding the same may have been granted by a city, and that the only reason it sustained the grant in *Enid City Ry. Co.* v. *City of Enid*, was that the same had been granted prior to the adoption of the constitution.

We have heretofore quoted from the *Pawhuska Oil & Gas Co.* v. *City of Pawhuska, Pioneer Telephone Co.* v. *State*, and *S. McAlester* v. *Eufaula*

Telephone Co., to show the construction placed upon the provisions of Art. 18 of the Constitution of Oklahoma, and Sec. 2, Chap. 93, Session Laws of 1913, of Oklahoma. We now desire to quote from the opinion of the Supreme Court in the present case, 166 Pac., p. 1061, as follows:

> "The next question raised is that the order of the Corporation Commission is void, for the reason that it impairs the obligations of the contract entered into between the Pawhuska Oil & Gas Co. and the City of Pawhuska, and is therefore repugnant to section 15, art. 2 of the Constitution of the United States prohibiting the passage of any law impairing the obligations of contracts. The authority granted to the City of Pawhuska in this case, under section 593, Rev. L. Okla., 1910, to fix and regulate the charges for gas furnished the inhabitants of said City, was the power delegated to it by the state, and said City only had such right until such time as the state saw fit to exercise its paramount authority directly by a law enacted by the people through the initiative and referendum or the State Legislature, or indirectly by that legislative subdivision of the government having such power by virtue of its delegation by the supreme legislative authority. By chapter 93, Session Laws, 1913, such power was delegated to the Corporation Commission. No specific authority having been conferred by the Constitution upon cities to fix and regulate the charges for gas in municipalities the right existed in the state to withdraw the power delegated to the municipalities, whenever, in the judgment of the Legislature, the public interest required it. There are numerous authorities to this effect."

Also from pages 1063 and 1064, as follows:

> "It is urged that the power of municipalities to regulate the charges of any public service corporation is protected by the proviso in section 18, art. 9, of the Constitution, but as we have already seen, a public service company furnishing gas to the inhabitants of a municipality does not come within the terms of said proviso. *Shawnee Gas & Electric Co.* v. *Corporation Commission*, 35 Okla. 454, 130 Pac. 137.
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> The second paragraph of section 7, art. 18, of the Constitution reads:
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> "Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."
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> This language is found in art. 18 of the Constitution, entitled "Municipal Corporations," and from this fact it is argued that as the City of Pawhuska had the power to regulate the charges for public service at the time of the adoption of the constitution, the provision above quoted should be construed as an inhibition against the exercise of that power by the Corporation Commission or by the Legislature itself, and that the exercise of such power by the Legislature or the Commission would be tantamount to the surrender of the power by the city. We do not think the language susceptible of such construction. That part of Sec. 7, Art. 18, above quoted, prohibiting the surrender of the power to regulate the charges for public services, is a limitation upon the supreme legislative power, as well as upon the subdivision of the state government to which such power is

or may be delegated within constitutional limitations by the legislative branch of the government. It simply means that this power of sovereignty cannot be surrendered. Such limitation upon the state and its subordinate subdivisions can only be abrogated by repeal or amendment of sec. 7, art. 18 of the Constitution.

In the case of the *Pawhuska Oil & Gas Co.* v. *City of Pawhuska*, supra, it was noted that the power to regulate the charges for public services was reserved to the city and the state. We there said:

"That said act was one of police regulation intended to prevent the waste of gas. The very act authorizing the city to grant this franchise is entitled 'An act to regulate the use and preservation of oil and gas, * * * *,' and stripped to the point, gives this and like companies authority to build pipe lines through the streets and alleys of the municipalities of this state, with the consent and 'subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted.' Which shows the intent of the state to be in authorizing the municipality to grant this franchise, to reserve to the municipality, notwithstanding the terms of the franchise, the power to police the business of distributing gas thereunder in that municipality. This police power had theretofore been reserved both to the state and to the city. Art. 18, Sec. 7 of the Constitution provides: "No grant, extension or renewal of any franchise, or other use of the streets, alleys, or other public grounds or ways of any municipality shall divest, the state, or any of its subordinate

> subdivisons of their control and regulation of such use and enjoyment." Having been expressly reserved by said section of the Constitution, to both the state and the municipality, and again expressly reserved to the city by the act authorizing the municipality to grant the franchise, the reservation of the power was as much a part of the franchise as if written therein. It follows that whether the franchise amounted to a contract between the city and the company we need not say, for sure it is, that the state by the act complained of, had a right to say to the company, as it did, in effect, by the terms of said act, that in the interest of the conservation of the natural resources of the state, the company shall no longer be permitted to sell gas at a flat rate but thereafter was required to furnish the same to its customers (with certain exemptions named in the act) through standard meters, and at meter rates. And this was a proper exercise of police power."

We think the above shows conclusively what construction the State Supreme Court has placed upon the various constitutional provisions involved in this controversy, and that such construction is entirely different from the construction sought to be placed upon them by the plaintiff in error, and has been the construction placed upon said provisions at all times since the adoption of the Constitution of the State. We understand the rule to be in this court that the construction placed upon the Constitution and laws of a state by the highest court of the state, will be followed by this court. On this proposition, we desire to quote from the

Milwaukee Electric Ry. & Light Co. v. *Railroad Commission of Wisconsin*, 238 U. S., 174, L. Ed. 1254. The following language is used on p. 1260:

> "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a period given from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 211 U. S. 265, 273, 53 L. Ed. 176, 182, 29 Sup. Ct. Rep. 50:
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> "The surrender, by contract, of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself as well as the authority to make it must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make any such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the state, are not sufficient. Specific authority for that purpose is required."

Again on pages 1260 and 1261, as follows:

> "It is true that this court has repeatedly held that the discharge of a duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligations of a contract requires this court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the state. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state in determining its meaning much consideration is given to the decisions of the highest court of the state. Among other cases which have asserted this principle, are *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493, and *Vicksburg* v. *Vicksburg Waterworks* Co., 206 U. S. 496, 509, 51 L. Ed. 1155, 1160, 27 Sup. Ct. Rep. 762.
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> In view of the weight which this court gives in deciding questions which involve the construction of legislative acts to decisions of the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed."

Recently, this court has had before it a case involving a similar proposition, the *City of Englewood* v. *Denver & S. Platte Ry Co.* This decision was rendered on Jan. 7th, 1919, and the same appears in the Supreme Court Advance Opinions of Feb. 1st, 1919, at page 149. In the opinion in that case, the court said:

> "Of course we do not go behind the decision of the court that the matter in controversy was subject to regulation by the Commission and was regulated by it in due form if the state could confer that power. The plaintiff says that the state could not confer it, since to do so would impair the obligation of a contract. Upon that point we agree with the court below that clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control."

CONCLUSION.

We therefore respectfully urge that the decision of the Supreme Court of Oklahoma in this case should be affirmed.

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